STATE OF MICHIGAN

IN THE SUPREME COURT

ANILA MUCI,

Plaintiff-Appellee,

v.

STATE FARM MUTUAL INSURANCE COMPANY,

Defendant-Appellant

Supreme Court Docket No: 129388
Court of Appeals Docket No: 251438
Lower Court Case No: 03-304534-NF

BRIEF OF AMICUS CURIAE BY MICHIGAN DEFENSE TRIAL COUNSEL

129388

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STATEMENT OF QUESTIONS INVOLVED

EVEN IF MCR 2.311(A) CAN BE APPLIED TO A PHYSICAL OR MENTAL EXAMINATION OF A CLAIMANT AT THE REQUEST OF A NO FAULT INSURER, DID THE TRIAL COURT ERR BY IMPOSING THE CONDITIONS IN QUESTION WITHOUT A PARTICULARIZED SHOWING OF GOOD CAUSE?

Defendant/Appellant answers this question "YES"

Plaintiff/Appellee answers this question "NO"

Amicus Curiae Michigan Defense Trial Counsel answers this question "YES"

The Court of Appeals answered this question "NO"

STATEMENT OF FACTS

Amicus Curiae Michigan Defense Trial Counsel accepts and adopts the Statement of Facts contained in the Brief of Defendant/Appellant, State Farm Mutual Automobile Insurance Company.

ARGUMENT

EVEN IF MCR 2.311(A) CAN BE APPLIED TO A PHYSICAL OR MENTAL EXAMINATION OF A CLAIMANT AT THE REQUEST OF A NO FAULT INSURER, THE CONDITIONS IN QUESTION CANNOT BE IMPOSED WITHOUT A PARTICULARIZED SHOWING OF GOOD CAUSE.

A. Introduction

In recent years, there have been increasing efforts by Plaintiffs to impose drastic conditions on court ordered mental or physical examinations. Plaintiffs have commonly sought the imposition of the following conditions, among others:

1. Compelling the examiner to disclose his or her income from litigation related examinations and other activities.

2. Allowing the Plaintiff's attorney, or another representative, to be present during the examination.

3. Allowing the Plaintiff to record the examination on video and audio tape.

4. Ordering that the examination be performed in the presence of a court stenographer.

5. Limiting the questions that can be asked by the examiner, or preventing the examiner from asking any questions whatsoever.

6. Preventing anyone from referring to the examination as "independent" at a deposition or trial, and ordering that the examination and examiner will be referred to as a "defense medical evaluation" and "defense medical examiner".

These conditions are often imposed as a matter of course, without an individualized showing of good cause, based upon the presumption that a medical examination performed at the request of the defendant can never be objective, and that all such medical examinations are in fact adversarial proceedings. Although there is no Michigan case law (apart from the decision of

the Court of Appeals in this case) directly addressing whether these types of conditions may properly be imposed upon mental or physical examinations, the propriety of such conditions has been extensively considered by the federal courts, under FRCP 35. The Michigan Court Rules, including MCR 2.311, are generally modeled after the Federal Rules of Civil Procedure. *Bush v. Beemer*, 224 Mich.App. 457, 461, 569 N.W.2d 636, 639 (1997); *Brewster v. Martin Marietta Aluminum Sales, Inc.*, 107 Mich.App. 639, 643, 309 N.W.2d 687, 689 (1981). This Court therefore does not lightly adopt a position at odds with the federal rules. *Shields v. Reddo*, 432 Mich. 761, 784, 443 N.W.2d 145, 155 (1989). Accordingly, in the absence of state authority, Michigan courts will look to cases interpreting comparable federal provisions to ascertain the intent of a given state rule. *Bush v. Beemer*, 224 Mich.App. 457, 461, 569 N.W.2d 636, 639 (1997); *Brewster v. Martin Marietta Aluminum Sales, Inc.*, 107 Mich.App. 639, 643, 309 N.W.2d 687, 689 (1981).

The overwhelming consensus of the federal courts is that conditions such as these should rarely, if ever, be imposed because they undermine the purpose and effectiveness of mental and physical examinations. The federal courts generally disapprove of the imposition of these conditions for the following reasons:

> 1. They constitute a distraction for the examiner and interject an adversarial atmosphere into what was intended to be an objective medical examination.
>
> 2. The examiner is deprived of information that is necessary for an objective opinion.
>
> 3. The examiner is forced to perform the examination in an atmosphere of intense suspicion, which will not only intimidate the examiner, but also make it far less likely that the examinee will answer relevant questions in an open and honest manner.

4. They undermine the purpose underlying medical examinations, which is to place the Plaintiff and Defendant (or insurer) on an equal footing.

5. The examiner is represented to the jury as nothing more than the Defendant's advocate.

The fourth of the above reasons bears special emphasis. Several courts have recognized that rules like MCR 2.311 and FRCP 35 are an attempt to place the parties on a somewhat equal footing with regard to medical proof. *Favale v. Roman Catholic Diocese of Bridgeport*, 235 F.R.D. 553, 557 (D.Conn., 2006); *Hertenstein v. Kimberly Home Health Care, Inc.*, 189 F.R.D. 620, 631 (D.Kan., 1999); *Holland v. U.S.*, 182 F.R.D. 493, 495 -496 (D.S.C., 1998); *Tirado v. Erosa*, 158 F.R.D. 294 (S.D.N.Y.1994) ("defendants were offered no such aid [by way of a stenographer] with plaintiff's examination by her own psychiatric expert, which apparently took place without the presence of third parties"); *Tomlin v. Holecek*, 150 F.R.D. 628, 632 (D.Minn., 1993). While a plaintiff is free to see as many healthcare professionals as he or she desires to assess his or her physical or mental condition, a defendant is limited to an examination under court rules like MCR 2.311 and FRCP 35, frequently for a one-time appraisal. *Tomlin v. Holecek*, 150 F.R.D. 628, 632 (D.Minn., 1993). A defendant has no standing to interfere with the plaintiff's choice of healthcare providers, nor is a defendant provided the opportunity to attend or videotape each of plaintiff's examinations with his or her own doctors. As one court noted:

> "In the absence of Rule 35, the Defendants' challenge to the physical or mental condition of the Plaintiff could only be advanced through the questioning of his treating or consulting health care professionals. The promulgators of Rule 35 obviously concluded that, under these circumstances, the crucible of cross-examination was an insufficient test of the truth and, accordingly, independent examinations, which could be undertaken only upon the agreement of the parties or at the discretion of the Court, were prescribed. While not without inherent shortcomings, the approach adopted by Rule 35 is a considered attempt to fairly place the parties on a somewhat equal footing. We say 'somewhat,' because

> the Rule 35 examination is, necessarily, an approximation a [sic] truly consultative approach and intrinsic distinctions between the Rule 35 examination and the evaluatory techniques of a treating physician do exist. On the one hand, the Plaintiff may select as many health care professionals as he should desire in order to appraise his physical or mental state on as many occasions as should be deemed necessary, while the Defendants' selection of a consultant is limited, at least to some degree, by their need to obtain the Court's confirmance before the selection can be finalized and, usually, for a one-time appraisal. On the other hand, the consultant retained by the Plaintiff is professionally constrained by the physician/patient relationship, which governs the treatment he or she may prescribe, while the involvement of the Defendants' expert is solely consultative, and is devoid of any direct responsibility for the Plaintiff's treatment or care.
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> . . . .
>
> To the extent that the Plaintiff regards the 2-hour interview [by defendant's expert] as providing an unacceptable degree of license with which she may question him at will, that degree of latitude is no greater than the liberality extended to the Plaintiff's consultants, who are expected to testify in this matter on the same general subject matter as may be anticipated from [defendant's expert].
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> . . . .
>
> In any event, the Plaintiff suffers no disadvantage by his inability to tape-record [the defense expert's] interview that is not shared by the Defendants who, insofar as this record discloses, are without a recording or a transcript of the interviews of the Plaintiff that were conducted by his psychologists. Our disposition in this matter, we feel, preserves the equal footing of the parties to evaluate the Plaintiff's mental state and to present their evaluations to a Jury, with their inherent strengths or weaknesses."
>
> *Tomlin*, supra, at 632 -633.

In short, allowing a plaintiff to record examinations, while the defendant is not afforded this same opportunity places the parties in very unequal positions.

In addition to the above, allowing the claimant's counsel to be present during medical examinations raises ethical concerns about plaintiff's counsel placing himself in the position of having to choose between participating in the trial as the litigator or as a witness.

None of this enhances the truth seeking process. Accordingly, Michigan Defense Trial Counsel joins in the concerns expressed by Defendant/Appellant State Farm Mutual Automobile Insurance Company. Conditions such as those listed above, especially when imposed as a matter of course, and without a particularized showing of good cause, undermine the purpose and effectiveness of mental and physical examinations. Although the conditions are imposed under the premise that they will enhance the objectivity and truth seeking function of the judicial process, they achieve exactly the opposite result.

B. A Claimant's Attorney or Other Representative Should Not Be Allowed To Attend The Examination In The Absence of A Particularized Showing of Need.

The weight of authority among federal courts is that plaintiff's counsel, or other representative of the plaintiff, should not be permitted to attend a physical or mental examination under FRCP 35, **absent a particularized, factual and compelling showing of need**. *Favale v. Roman Catholic Diocese of Bridgeport*, 235 F.R.D. 553, 557 (D.Conn., 2006); *E.E.O.C. v. Grief Bros. Corp.*, 218 F.R.D. 59, 64 (W.D.N.Y., 2003); *Cabana v. Forcier*, 200 F.R.D. 9, 12 (D.Mass., 2001); *Abdulwali v. Washington Metro Area Transit Authority*, 193 F.R.D. 10, 13 (D.D.C., 2000); *Hertenstein v. Kimberly Home Health Care, Inc.*, 189 F.R.D. 620, 624 (D.Kan., 1999); *Tomlin v. Holecek*, 150 F.R.D. 628, 631 (D. Minn. 1993) (noting that "the greater weight of authority [among federal courts] favors the exclusion of the Plaintiff's attorney from the conduct of a medical examination"); *Romano v. II Morrow Inc.*, 173 F.R.D. 271, 274 (D. Ore. 1997) (denying plaintiffs' request to have attorney or non-attorney observer attend examination); *Wheat v. Bisecker*, 125 F.R.D. 479, 480 (N.D. Ind., 1989) (observing that "[t]he majority of cases

have held that an attorney does not have the right to be present for the examination"); *McDaniel v. Toledo, Peoria & Western Railroad Co.*, 97 F.R.D. 525, 527 (C.D. III. 1983); *Warrick v. Brode*, 46 F.R.D. 427, 428 (D. Del. 1969) (refusing to allow plaintiff's attorney to attend examination because it "would tend to move the forum of the controversy from the courtroom to the doctor's office").

Stereotyped and conclusory statements are not sufficient for a showing of good cause. *Hertenstein*, supra, at 624. Additionally, the mere fact that the examiner was retained by the defendant is not sufficient to establish good cause for the presence of plaintiff's counsel during a medical examination. *Hertenstein*, supra, at 631; *Romano*, supra, at 274; *Galieti v. State Farm Mut. Auto. Ins. Co.*, 154 F.R.D. 262, 265 (D.Colo., 1994).

The courts have offered several reasons supporting the exclusion of the examinee's attorney from mental or physical examinations. First of all, the courts have repeatedly stated that the special nature of the psychiatric examination requires direct and unimpeded one-on-one communication without external interference or intrusion. *Cabana v. Forcier*, 200 F.R.D. 9, 12 (D.Mass., 2001); *Shirsat v. Mutual Pharmaceutical Co.*, 169 F.R.D. 68, 71 (E.D. Pa. 1996). Indeed, the overwhelming majority of federal courts that have considered the issue of counsel's attendance at a psychiatric examination has concluded that counsel should be excluded. See, e.g., *Cabana v. Forcier*, 200 F.R.D. 9, 12 (D.Mass., 2001); *Abdulwali v. Washington Metro Area Transit Authority*, 193 F.R.D. 10, 13 (D.D.C., 2000)(holding that a plaintiff was not entitled to have her attorney present during a psychiatric exam); *Lahr v. Fulbright & Jaworski, L.L.P.*, 164 F.R.D. 196, 202 (N.D.Tex., 1995)(holding that a plaintiff was not entitled to have her attorney present during a psychological exam); *Tirado v. Erosa*, 158 F.R.D. 294, 295 (S.D.N.Y. 1994)(plaintiff in civil rights action not entitled to have attorney present at psychiatric

examination); *DiBari v. Incaica Cia Armadora*, 126 F.R.D. 12, 13 (E.D.N.Y. 1989) (personal injury plaintiff not entitled to have counsel present at psychiatric examination); *Tomlin*, 150 F.R.D. at 632; *Lowe v. Philadelphia Newspapers, Inc.*, 101 F.R.D. 296, 299 (E.D. Pa., 1983) (denying plaintiff's request in an employment discrimination action that counsel be allowed to attend psychiatric examination); *Neumerski v. Califano*, 513 F. Supp. 1011, 1017 (E.D. Pa. 1981) (holding that plaintiff has no right to have attorney present at psychological examination); *Brandenberg v. El Al Israel Airlines*, 79 F.R.D. 543, 544 (S.D.N.Y. 1978) (plaintiff not entitled to have attorney present at psychiatric examination conducted in connection with tort claim for mental and psychiatric injuries); *Shirsat*, 129 F.R.D. at 71 (refusing plaintiff's request that an independent observer be allowed to attend the psychiatric examination); *Galieti v. State Farm Mutual Automobile Ins. Co.*, 154 F.R.D. 262, 265 (D. Colo. 1994) (ordering plaintiff to submit to unsupervised and unrecorded psychiatric examination).

Secondly, in contrast to depositions, mental and physical examination are not intended to be adversarial. *E.E.O.C. v. Grief Bros. Corp.*, 218 F.R.D. 59, 64 (W.D.N.Y., 2003); *Cabana v. Forcier*, 200 F.R.D. 9, 12 (D.Mass., 2001); *Hertenstein*, supra, at 629; *Romano v. II Morrow, Inc.*, 173 FRD 271 (D.C. Or., 1997); *Tomlin v. Holecek*, 150 FRD 628 (D.C. Minn., 1993); *McDaniel v. Toledo, Peoria and Western R. Company*, 97 FRD 525, 526-527 (D.C. Ill., 1983); *Warrick v. Brode*, 46 FRD 427 (D.C. Del., 1969). The very presence of a lawyer for the examined party injects a partisan character into what should be a wholly objective inquiry. *Warrick*, supra, at 428. The decision in *Tomlin,* supra, is instructive on the adverse impact that counsel's attendance has on the effectiveness of a mental or physical examination. In *Tomlin*, the plaintiff objected to a psychological examination to which he was ordered to submit on the grounds that the interview portion of the examination would expose him to an "unfettered

inquiry" by an "agent" of the defendant, the sole purpose of which was to "disparage the value of [the plaintiffs] case." *Tomlin,* supra, at 631. The court categorically rejected the notion that the federal counterpart to MCR 2.311 is a "Court-sanctioned means by which the Defendants can select a 'hired gun' who can be expected to submit a conclusory report which fully absolves the Defendants from any responsibility for the Plaintiff's psychological impairment if, indeed, any impairment should be found." *Tomlin*, supra, at 632. In denying the plaintiff's request that his counsel be allowed to attend the examination, as well as his request that a tape recording be made of the examination, the court reasoned that "the presence of third parties would lend a degree of artificiality to the interview technique which would be inconsistent with applicable, professional standards." *Tomlin,* supra, at 632. The *Tomlin* court also noted that such a restriction on the FRCP 35 examination would infuse a greater degree of advocacy in the examinations than is already present:

> "Were we to honor the Plaintiff's request, that his counsel be present during the interview or that a tape recording of the interview be preserved so as to assist in his attorney's questioning of [the Defendant's expert], we would be endorsing, if not promoting, the infusion of the adversary process into the psychologist's examining room to an extent which is, in our considered judgment, inconsistent with the just, speedy and inexpensive resolution of civil disputes, and with the dictates of Rule 35." Id. at 633-34.

Thirdly, several courts have held that allowing the claimant's counsel to be present during medical examinations raises ethical concerns about plaintiff's counsel placing himself in the position of having to choose between participating in the trial as the litigator or as a witness. *Holland v. U.S.*, 182 F.R.D. 493, 495 (D.S.C., 1998); *Wheat v. Biesecker*, 125 F.R.D. 479, 480 (N.D. Ind., 1989); *McDaniel v. Toledo, Peoria and Western R. Co.*, 97 F.R.D. 525 (C.D. Ill., 1983). As the court stated in *Wheat*, supra:

> "A plaintiff's attorney should be reluctant to involve himself in the physical examination. If a question arises concerning the responses made by the plaintiff, the attorney may find himself in the unenviable position of being a witness during the trial. Disciplinary Rule 5-102 of the Code of Professional Responsibility prohibits an attorney from acting as both a lawyer and a witness during a trial. Therefore, by attending the medical examination, the attorney may be placing himself in the position of having to choose between participating in the trial as the litigator or as a witness." *Wheat*, supra, at 480 (N.D.Ind., 1989).

Fourthly, fairness dictates that if defense counsel cannot be present when a plaintiff is interviewed by a psychiatrist who will testify at trial on his behalf, then plaintiff's counsel cannot be present when plaintiff is examined by defendant's expert psychiatrist. *Cabana v. Forcier*, 200 F.R.D. 9, 12 (D.Mass., 2001).

Finally, any concerns regarding distortions or inaccuracies by the examiner can be adequately addressed by counsel's ability to confer with plaintiff regarding the exam, review the examiner's report, depose the examiner, and cross-examine the examiner at trial. *Cabana v. Forcier*, 200 F.R.D. 9, 12 (D.Mass., 2001); *Abdulwali v. Washington Metro Area Transit Authority*, 193 F.R.D. 10, 14 (D.D.C., 2000); Wheat v. Biesecker, 125 F.R.D. 479, 480 (N.D.Ind., 1989).

C. Audio/Visual Recording of a Mental of Physical Examination Should Not Be Imposed In The Absence of A Particularized Showing of Need.

Just as they have disapproved of the presence of plaintiff's counsel during medical or psychological examinations, the majority of federal courts have rejected the notion that a medical examination can be monitored by audio and/or visual means. Such recording has generally been rejected for essentially the same reasons already discussed in the preceding section of this brief. *E.E.O.C. v. Grief Bros. Corp.*, 218 F.R.D. 59 (W.D.N.Y., 2003)(absent special circumstances, such recording system may undermine the effectiveness of the examination); *Shirsat*, supra, at

70-71. Recording of the examination should be ordered only where the examinee shows special circumstances demonstrating the need for such recording. *E.E.O.C. v. Grief Bros. Corp.*, supra, at 64; *Tomlin*, supra, at 631. The use of recording devices during examinations is generally regarded to constitute a distraction during the examination, which would diminish the accuracy of the process. *Shirsat*, supra, at 70-71; *Romano*, supra, at 274 ("observer, court reporter, or recording device, would constitute a distraction during the examination and work to diminish the accuracy of the [physical examination] process"). As one court observed:

> "Clearly, the presence of a videographer could influence [the examinee], even unconsciously, to exaggerate or diminish his reactions to [the examiner's] physical examination. [The examinee] could perceive the videotape as critical to his case and fail to respond in a forthright manner. In addition, the videotape would give Plaintiffs an evidentiary tool unavailable to Defendant, who has not been privy to physical examinations made of [the examinee] by either his treating physicians or any experts he may have retained." *Holland*, supra, at 496.

Accordingly, such recording of the examination should not be ordered in the absence of compelling circumstances. *Holland*, supra, at 496.

D. An Examiner Should Not Be Precluded From Asking Questions Which He or She, In The Exercise of His Or Her Professional Judgment, Deems Necessary To Determine The Plaintiff's Condition.

Although the Plaintiff/Appellee asserts, and the lower court accepted, that the medical examiner can be precluded from asking certain questions during an examination, this claim has found no favor in the reported decisions. At least two courts have recognized that to restrict a physician from questioning a patient during a physical examination unduly restricts the physician's ability to obtain the information necessary to reach medical conclusions. *Hertenstein*, supra, at 626; *Romano*, supra, at 273. Furthermore, "[t]he questioning of the plaintiffs by defense counsel during the taking of their depositions, the historical medical

records, and the answers of the plaintiffs to interrogatories are no substitute for the answers to questions that a physician must pose to a patient during a physical examination." *Romano*, supra, 273. As the same court further noted, "[a]ll of the questions that a medical doctor needs to ask, in particular the follow-up questions, cannot be determined in advance of the medical examination." *Romano*, supra, at 273. This is especially true since the court will not have the medical or psychological expertise necessary to second guess the examiner regarding the appropriate scope of the examination. Accordingly, the court should assume that the examiner will exercise sound professional discretion and will not pursue private information unrelated to the purpose for the examination. *Hertenstein*, supra, at 626. When ordering a mental or physical examination, the courts should assume that the selected physician will conduct the examination in an ethical and professional manner. *Hertenstein,* supra, at 620. This is consistent with the very purpose of such examinations to place the parties on a somewhat equal footing with regard to medical proof. The examiner should therefore be allowed to ask questions which he or she, in the exercise of his or her professional judgment, deems necessary to determine the plaintiff's condition.

RELIEF

For all of the foregoing reasons, Amicus Curiae Michigan Defense Trial Counsel prays that this Court enter an order vacating the August 25, 2003 "Order Allowing Physical Examination of Plaintiff Pursuant to MCR 2.311," and remand this matter to the lower court with instructions to proceed with the examination without the improperly imposed conditions.

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